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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
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| COUNTY OF RICHLAND | ) | Civil Action No. 2019-CP-4005486 |
| | ) | |
| ROBERT DURDEN INGLIS; FRANK HEINDEL, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| THE SOUTH CAROLINA REPUBLICAN PARTY & DREW MCKISSICK, State Chairman of the South Carolina Republican Party, in his official capacity. | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Just four years ago, the South Carolina Republican Party told a federal court that delaying the presidential primary would "caus[e] irreparable harm to the public interest" because the "the citizens of South Carolina *deserve* an opportunity to vote on the Republican nominee for President of the United States."[1] Any delay, the Republican Party asserted, would cause "significant and irreparable harm" because its "'First in the South' Republican presidential primary is critically important to" its "continued status and vitality."[2]

In this lawsuit, plaintiffs Bob Inglis and Frank Heindel only ask the South Carolina Republican Party for what it has already said they deserve: the ability to cast the first southern votes in the 2020 Republican presidential primary. Unfortunately, however, the Executive Committee of the South Carolina Republican Party has instead canceled its primary in violation of South Carolina law and party rules and outsourced South Carolina's "First in the South" status to Alabama.

Thus the need for a preliminary injunction. By law, the Republican Party needs to notify the State Election Commission of the primary date no later than ninety days before the primary. *See* S.C. Code Ann. § 7-11-20(B)(3). And Alabama (and Arkansas, North Carolina, and Texas for that matter) are presently scheduled

[1] Def. S.C. Republican Party's Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj./Rule 12(b)(6) Mot. to Dismiss at 6, *Coyne v. S.C. Sec'y of State*, No. 3:15-cv-03669 (D.S.C. Nov. 16, 2015), ECF No. 18 (emphasis added).

[2] *Id.*

to hold a primary on March 3, 2020.[3] As a result, if plaintiffs are not granted relief by December 4, their opportunity to cast the first primary votes in the southern United States in the 2020 Republican primary will be forever lost.

So this Court should issue an injunction to reverse the State Executive Committee's unlawful cancelation of the presidential primary. When judging whether to issue a preliminary injunction, this Court considers three factors: (1) whether plaintiffs "will suffer irreparable harm" in the absence of an injunction," (2) whether plaintiffs have an "adequate remedy at law," and (3) whether plaintiffs have "a likelihood of success on the merits." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). Each of those equitable factors points in favor of an injunction.

The denial of the opportunity to vote constitutes the archetype of an irreparable injury that cannot be repaired with a later award of monetary damages. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."). And lest there be any doubt on that point, the South Carolina Republican Party resolved it four years ago when it pronounced that canceling the South Carolina primary would impose irreparable harm on the public.

That means that plaintiffs' request for a preliminary injunction turns on whether they can demonstrate a likelihood of success. Plaintiffs can show that as

[3] *See* Sarah Almukhtar et al., *2020 Presidential Election Calendar*, N.Y. Times (updated Oct. 8, 2019), https://www.nytimes.com/interactive/2019/us/elections/2020-presidential-election-calendar.html.

well. Both South Carolina law and the rules of the South Carolina Republican Party require that *if* a party wishes to cancel its primary, it must observe certain democratic safeguards that ensure that a party's supporters—and not just a small junta of party bosses—favor canceling the primary. But the State Executive Committee repeatedly violated those democratic safeguards when canceling the presidential primary.

For example, section 7–11–20 of South Carolina's Election Law requires a political party to follow its own party rules when picking a general election candidate—a command that the Executive Committee broke when it canceled the primary in violation of party rules requiring a positive convention vote before a presidential primary may be canceled. *See* S.C. GOP, *The Rules of the South Carolina Republican Party*, Rule 11(b)(1) (May 13, 2017) ("Unless decided otherwise by the state party convention within two (2) years prior to each presidential election year, the South Carolina Republican Party shall conduct a statewide presidential preference primary . . . .").[4] Likewise, section 7–11–30 of South Carolina's Election Law requires both a party's convention and a party's primary voters to approve of canceling a primary election in favor of a political convention—a command that the Executive Committee broke by deciding which candidate to support by fiat, and in doing so, excluded Republican voters from the process entirely.

[4] *Available at* https://www.sc.gop/resources/rules/ (last visited Oct. 9, 2019). This memorandum uses the phrases "presidential primary" and "presidential preference primary" interchangeably.

For those reasons (and more outlined below), plaintiffs are likely to prevail on their claims that the State Executive Committee violated South Carolina law when it unilaterally canceled the 2020 Republican presidential primary. Accordingly, this Court should issue a preliminary injunction to prevent the State Executive Committee from accomplishing its goal of disenfranchising South Carolinians simply by running out the clock on this litigation.

## BACKGROUND

On September 7, 2019, the Executive Committee of the South Carolina Republican Party voted to cancel the South Carolina Republican Party's 2020 presidential primary.[5] Rob Godfrey, who served as a top advisor to former South Carolina Governor Nikki Haley, called the cancelation "a shady backroom deal where a small group of party insiders made a big decision that stops hundreds of thousands of voters from participating in the process."[6]

On October 1, 2019, plaintiffs filed this lawsuit to enforce the democratic safeguards guaranteed by party rules, state law, and the South Carolina Constitution. Plaintiffs intended to vote in the 2020 Republican primary and still wish to do so.

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[5] *See* Jamie Lovegrove, *SC Republicans Vote to Forgo 2020 GOP Presidential Primary, Setting Up Trump Renomination*, The Post and Courier (Sept. 7, 2019), *available at* https://www.postandcourier.com/politics/sc-republicans-vote-to-forgo-gop-presidential-primary-setting-up/article_96d05722-d0d6-11e9-9771-6ba2d039a3e4.html.

[6] *See* Steve Peoples *et al.*, *Still On: Iowa, New Hampshire, Won't Nix 2020 GOP Contests*, Associated Press (Sept. 11, 2019), *available at* https://www.apnews.com/3cf0a814468b4aa9bc1679aae61fe1ae.

Bob Inglis is a registered voter in Greenville County, South Carolina. Ex. 1, Aff. of Robert Durden Inglis (hereinafter, "Aff. of Mr. Inglis") ¶ 1. He previously represented South Carolina as a Republican in the United States Congress from 1993–1999 and 2005–2011. *Id.* ¶ 2. Mr. Inglis has voted regularly in South Carolina, including in many Republican primaries, for over three decades. *Id.* ¶ 3. He views primary elections as the place where he, as a member of the Republican Party, can shape how the party looks and feels. *Id.* ¶ 5. He intended to vote in the 2020 South Carolina Republican presidential preference primary—a vote that he recognizes is "particularly influential" due to South Carolina's "First in the South" status. *Id.* ¶ 5. As a result, the decision to cancel the primary harmed Mr. Inglis because it denied him his best chance to steer his party in the direction he wants. *Id.* ¶ 6.

Plaintiff Frank Heindel is a registered voter in Charleston County, South Carolina. Ex. 2, Aff. of Frank Heindel (hereinafter, "Aff. of Mr. Heindel") ¶ 1. Mr. Heindel regularly votes, including in the South Carolina Republican primaries in 2000, 2002, 2004, 2008, and 2012, and he has donated to the South Carolina Republican Party. *Id.* ¶¶ 2–3. Mr. Heindel intended to vote in the 2020 Republican presidential primary, and he still desires to do so because he believes that voting in a primary is part of having a healthy debate, a healthy party, and a healthy democracy. *Id.* ¶¶ 4–5. He also recognizes that the "First in the South" primary offers him and the South Carolina Republican Party an "outsized influence over the direction of the national party." *Id.* ¶ 6. Accordingly, Mr. Heindel is harmed by the

South Carolina Republican Party's decision to cancel the 2020 Republican presidential preference primary because it denies him the ability to vote and thwarts his opportunity to express his political views and participate in the democratic process.

On October 8, 2019, plaintiffs filed a motion for a preliminary injunction. They now submit this brief in support of the motion.

## ARGUMENT

"A preliminary injunction should issue" when it is "necessary to preserve the status quo" and "upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). Here, a preliminary injunction is necessary to preserve the status quo and all three elements of the test favor plaintiffs. This Court should issue an injunction.

### I. Plaintiffs are likely to succeed on the merits because defendants have violated South Carolina law and the South Carolina Constitution.

#### A. Defendants violated section 7–11–20 and the South Carolina Constitution (and acted *ultra vires*) when they broke their own rules to cancel the primary.

Both South Carolina statutory and constitutional law requires the Republican Party to follow its own rules when nominating candidates. Accordingly, defendants violated both the South Carolina Code as well as the South Carolina Constitution when they broke party rules to cancel the 2020 presidential primary.

*1) The State's Election Law, Constitution, and corporate and administrative law all require the S.C. GOP to follow its rules when nominating candidates for a general election.*

South Carolina Election Law. Subsection 7–11–20(A) of the Code requires that certified political parties' nomination of candidates for a general election be conducted "in accordance with . . . party rules not in conflict with the provisions of this title or of the Constitution and laws of this State or of the United States."

Subsection 7–11–20(B) further explains that the presidential primaries are not an exception to that general rule that parties must follow South Carolina law and their own rules. Of course, presidential primaries operate slightly differently from garden-variety primaries insofar as voters do not directly choose the candidate (and are therefore sometimes called presidential preference primaries). But subsection 7–11–20(B) mandates that party rules must be followed, specifying that when a party that has received at least five percent of the popular vote in South Carolina for the party's candidate for President of the United States "decides to hold a presidential preference primary election, the State Election Commission must conduct the . . . primary" and must do so "in accordance . . . with party rules."[7]

[7] The phrase "decides to hold a presidential preference primary" is best understood as a reference to a certified political party's option to hold a state party convention instead, as mentioned in sections 7–11–10 and 7–11–30. It would strain credulity to read into that phrase the implication that a state party could simply choose to select its candidate for a general election through a process that is neither a primary nor a convention. *See State of S.C. v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose.").

Thus, the Election Law prohibits the State Executive Committee from violating party rules when selecting a general election candidate.

South Carolina Constitution. The South Carolina Constitution also requires the Republican Party to follow its own rules when canceling elections. Article I, Section 3 of the South Carolina Constitution provides that no person "shall . . . be deprived of . . . liberty . . . without due process of law." S.C. Const. art. I, § 3. As a result, the government cannot deprive individuals of cognizable liberty interests for "arbitrary reasons" or in ways that are fundamentally unfair. *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016).[8]

Presidential preference primaries "are elections" and thus are "subject to state and federal laws concerning the electoral process." *Beaufort Cty*, 395 S.C. at 379 n.5, 718 S.E.2d 432 at 439 n.5 (Hearn, J., concurring in part and dissenting in part); *see also Storer v. Brown*, 415 U.S. 724, 735 (1974) (observing that the primary process is "an integral part of the entire election process"). And when party officials "participate in what is a part of the state's election machinery," they become "election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution." *Rice v. Elmore*, 165 F.2d 387, 391 (4th Cir. 1947); *see, e.g.*, *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 203 (2008).

The right to vote is a protected liberty interest. *United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966) (right to vote is one of the fundamental personal

[8] *See also, e.g.*, *Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009); *Worsley Cos., Inc., v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000).

rights included within the concept of liberty as protected by the Due Process Clause), *summarily aff'd*, 384 U.S. 155 (1966); *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Thus, like any other state agency, the S.C. GOP must "follow its own regulations" when depriving individuals of protected liberty interests. *See Triska*, 292 S.C. at 194, 355 S.E.2d at 533; *cf. United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–68 (1954).[9]

Corporate and Administrative Law. Principles of South Carolina corporate and administrative law similarly prohibit the State Executive Committees from contravening party rules.

In South Carolina, corporations "may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). State agencies likewise may "only exercise those powers which have been conferred upon [them] by the South Carolina General Assembly." *Triska*, 292 S.C. at 194, 355 S.E.2d at 533. When a corporation or a state agency violates its own bylaws or regulations, those actions are "*ultra vires*" and null and void. *See Fisher*, 415 S.C. at 271, 781 S.E.2d at 911 (corporations);[10] *Triska*, 292 S.C.

[9] *See also, e.g.*, *Converse Power Corp. v. S.C. Dep't of Health & Env't Control*, 350 S.C. 39, 54–55, 564 S.E.2d 341, 350 (Ct. App. 2002).

[10] *See also Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) (same); *Trost v. Sea Mark Tower Prop. Owners Ass'n, Inc.*, No. 2004–UP–284, 2004 WL 6310042, at *3–4 (S.C. Ct. App. Apr. 29, 2004) (same).

at 194, 355 S.E.2d at 533 (state agencies).[11]

So, too, must certified political parties abide by their own regulations in nominating candidates for a general election. As explained above, certified political parties are effectively arms of the state, and therefore subject to many of the same legal constraints as state actors, when nominating candidates for a general election. *See supra* at pp. 8–9. And therefore, like state agencies and corporations, certified political parties must abide by their own rules in nominating candidates, and any *ultra vires* action is null and void. *Cf. Triska*, 292 S.C. at 194, 355 S.E.2d at 533; *Seabrook Island Prop. Owners Ass'n*, 292 S.C. at 348, 356 S.E.2d at 414.

*2) Defendants violated South Carolina Republican Party rules in purporting to cancel the 2020 primary.*

Here, the State Executive Committee violated the party's rules when it purported to cancel the party's 2020 primary. As with the interpretation of any binding text, the "cardinal rule" when interpreting party rules is to "ascertain and effectuate the intent" of the drafters. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (statutes); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (contracts). To do so, South Carolina courts apply the "plain meaning rule," under which courts defer to the plain text where it is "clear and unambiguous." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

[11] *See also Responsible Econ. Dev. v. S.C. Dep't of Health & Envtl. Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (same); *Converse Power Corp. v. S.C. Dep't of Health & Env't Control*, 350 S.C. 39, 54–55, 564 S.E.2d 341, 350 (Ct. App. 2002) (same).

The clear and unambiguous text of the rules reflects the drafters' intent to prohibit the State Executive Committee from unilaterally canceling the party's presidential primary. Rule 11(b)(1) states that "[u]nless decided otherwise by the *state party convention* within two (2) years prior to each presidential election year, the South Carolina Republican Party *shall* conduct a statewide presidential preference primary on a date selected by the chairman of the party[.]" S.C. GOP Rule 11(b)(1) (emphases added). The only discretion allotted to any member of the State Executive Committee is the discretion the rule provides the party chairman—here, defendant McKissick—to choose a *date* for the primary. *Id.* No other provision gives anyone any authority to cancel the primary. Indeed, the only other circumstance in which the rule permits the party *not* to hold a primary is when, "after the closing of the filing period for the presidential preference primary[,] no more than one candidate has qualified." S.C. GOP Rule 11(b)(3).

That the drafters did not intend to grant the State Executive Committee unilateral power to cancel the party's presidential preference primary is confirmed by Rule 11(b)(2). In contrast to Rule 11(b)(1), Rule 11(b)(2) provides that, in the event the state party convention decides *not* to conduct a primary, the State Executive Committee may "override the decision of the convention and reinstate the primary." The drafters' express provision of the power to unilaterally reinstate a presidential primary strongly implies that they did not intend to confer the inverse power. *See Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 ("The canon of construction

*expressio unius* . . . holds that to express or include one thing implies the exclusion of another, or of the alternative." (internal quotation marks omitted)).

More generally, S.C. GOP Rule 2 evidences the drafters' general intent to limit the State Executive Committee's power to disavow the written rules. Rule 2(f) provides that the S.C. GOP rules "may be amended only by the State Convention by a two-thirds (2/3) vote of the total number of delegates registered and approved for that convention or reconvened convention." Rule 2(g) specifies that although "[t]he State Executive Committee or the State Chairman may cause explanatory footnotes to accompany these Rules when published or printed," "[s]uch footnotes or explanatory comment shall not be regarded as part of these Rules or have the force of Party Rules, but shall be considered as advisory only." And Rule 2(h) permits the State Executive Committee to "adopt for their own purposes such rules as they deem necessary," but only so long as those rules "are not in conflict with these Rules." Each of these provisions indicates that the drafters of the S.C. GOP Rules did not intend to vest the State Executive Committee with any general authority to contravene the written rules.[12]

Where the rules do permit the State Executive Committee to deviate from the strict text of the rules, they do so explicitly. For example, Rule 11(b)(1) provides that the South Carolina Republican Party "must" conduct its presidential preference primary "within two weeks after the New Hampshire Republican

[12] Defendants may seek to invoke Rule 2(a), which provides that "[t]he spirit and not the letter of each Rule shall be controlling," and that "[s]ubstantial compliance with a Rule shall be sufficient." But contravening the letter and intent of Rule 11(b)(1) neither vindicates its spirit nor constitutes "substantial compliance."

Primary, or earlier if necessary to preserve South Carolina's 'First in the South' status." The next sentence of Rule 11(b)(1), however, specifies that "[n]otwithstanding this provision, the State Chairman and the State Executive Committee have the right to set the primary date."

In sum, the plain text of the rules requires the party to conduct a presidential primary, unless the state convention decides not to conduct a primary or no more than one candidate has qualified. The rules do not permit the State Executive Committee to cancel a primary by committee vote. Because the State Executive Committee did so, it violated S.C. Code Ann. § 7–11–20, the South Carolina Constitution's Due Process Clause, and acted *ultra vires*. So defendants' failure to follow the party's own rules is unlawful, as well as null and void *ab initio*.

### B. Defendants have also violated sections 7–11–10 and 7–11–30 of the South Carolina Election Law.

Section 7–11–10 lays out the basic requirement that certified political parties may select general election candidates only by either primary election or party convention. It states: "[n]ominations for candidates for the offices to be voted on in a general or special election may be by political party primary, by political party convention, or by petition." S.C. Code Ann. § 7–11–10. (The third option—nomination by petition—is only for candidates who do not intend to be nominated by a political party and thus is not relevant here.) This limited set of options makes sense: it "furthers the state's interest in ensuring orderly, fair, and efficient

procedures for the election of public officials." *S.C. Green Party v. S.C. State Election Comm'n,* 612 F.3d 752, 759 (4th Cir. 2010).[13]

Defendants have purported to decide by State Executive Committee vote to use neither a primary nor a state convention to select whom the state party supports as a candidate for President. Defendants have therefore violated section 7–11–10 of the South Carolina Election Law, which requires certified political parties to use either a party primary or a state convention. S.C. Code Ann. § 7–11–10. Because the law does not permit a party to use any other method, the State Executive Committee is not empowered to take away the party members' choice of candidates. It must follow the law, which is designed to ensure that the party doesn't "simply select[] its nominees in a backroom or underhanded fashion." *See* S.C. Republican Party State Exec. Comm. Res., *Support of Integrity, Openness, and Fairness in the Primary Process* (May 3, 2014).[14]

Plaintiffs assume that the S.C. GOP intends to hold a state party convention before May 15, 2020, as required by law. *See* S.C. Code Ann. § 7–9–100 (political party must hold a state convention "during a thirteen-month period ending May fifteenth of every general election year"). If defendants characterize the State Executive Committee's decision as one to use the May 2020 party convention

[13] *See also Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) ("It is too plain for argument" that the United States Constitution allows a state to "insist that intraparty competition be settled before the general election by primary election or by party convention.").

[14] *Available at* https://www.sc.gop/wp-content/uploads/2014/05/SCGOP-Res-PrimaryNeutrality.pdf (last visited Oct. 9, 2019).

(rather than a primary) to determine whom the state party supports for President, then defendants violated section 7–11–30 by failing to follow the statutorily mandated process to switch from a primary to a convention nomination process.

Section 7–11–30 describes the process that a political party must use if it has nominated candidates by primary in the past but wishes to nominate candidates by convention in the future. It also further confirms that there are only two methods a political party may use to select a nominee—a primary or a state convention. It states, in relevant part:

> (A) A party may choose to change from nomination of candidates by primary to a method to nominate candidates by convention for all offices . . . if:
>
> > (1) there is a three-fourths vote of the total membership of the convention to use the convention nomination process; and
> >
> > (2) a majority of voters in that party's next primary election approve the use of the convention nomination process.

S.C. Code Ann. § 7–11–30; *see also* Letter from Brendan McDonald, from Assist. Att'y Gen., to Marci Andino, Exec. Dir. of S.C. Election Comm'n, at 2–3 (Nov. 12, 2013).[15]

[15] *Available at* http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2013/11/andino-m-os-9690-11-12-13-S.2-impact-on-political-parties-nominate-candidates-convention-process.pdf. The legislature emphasized the importance of a positive convention vote in 2013 when it amended section 7–11–30 to require increased party support before a party could switch from using a primary to using a state convention. As the State Election Commission explained in a 2014 court filing regarding section 7–11–30:

But the State Executive Committee has not complied with section 7–11–30. There was neither a three-fourths vote at the last state party convention to hold a convention to select a nominee for President in 2020, as required by section 7–11–30(A)(1), nor have a majority of voters in the South Carolina Republican Party's most recent primary election approved the use of the convention nomination process, as required by section 7–11–30(A)(2). Thus, defendants violated section 7–11–30 by failing to comply with the democratic safeguards required for a political party to switch from a primary to a convention. *See* S.C. Code Ann. § 7–11–30.

Defendants may try to argue that section 7–11–30 does not govern presidential preference primaries. That argument should fail: although presidential preference primaries are not identical to primaries for other offices, the text and structure of section 7–11–30 make clear that it applies broadly to all primaries. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used." *Sweat,* 386 S.C. at 350, 688 S.E.2d at 575. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d

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> South Carolina, through its General Assembly, has historically recognized, and does today, a preference for the party primary. The State's decision to impose a three-fourths vote requirement to use a convention to nominate in lieu of a primary simply demonstrates the State's desire to be assured that such decision is done with serious reflection and with a consensus of party members attending the convention.

Resp. Br. of Appellees at 40–41, *Greenville Cty. Republican Party Exec. Comm. v. Way*, No. 13-2170 (4th Cir. Mar. 31, 2014), ECF No. 30-1.

525, 530 (2010). And "Court[s] should give words 'their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *Sweat,* 386 S.C. at 350, 688 S.E.2d at 575.

Moreover, a statute should be read as a whole: "In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Sweat,* 386 S.C. at 350, 688 S.E.2d at 575. "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). And "[a]ny ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575. In addition, a court may consider "the title and headings of a statute . . . to shed light on an ambiguous word or phrase." *McInnis v. McInnis*, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002).

With these principles in mind, the applicability of section 7–11–30 to presidential primaries is clear. Section 7–11–30 states: "A party may choose to change from nomination of candidates by primary to a method to nominate candidates by convention for *all* offices including, *but not limited to,* Governor, United States Senator, United States House or Representative, Circuit Solicitor, State Senator, and members of the State House of Representatives . . . ." S.C. Code Ann. § 7–11–30 (emphases added). So the text is clear: Section 7–11–30 encompasses candidates for "all offices," including President of the United States.

"The Court should give words 'their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *Sweat,* 386 S.C. at 350, 688 S.E.2d at 575. Here, the word "all" should be interpreted to mean just that—all. Not "some" or a "few."

The very next phrase in the statute reinforces that "all" means *all*. The text provides a list of examples, explaining that the section applies to "all offices, including, *but not limited to*" the enumerated offices. The plain language of "but not limited to" means that the list is not limited to the following examples—instead, "all offices" are included, as the text commands. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 (words should be given "their plain and ordinary meaning"). Interpretative canons support this reading as well. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text* 132–33 (2012) (explaining that "*include* does not ordinarily introduce an exhaustive list," and the phrase "*including but not limited to*" is intended to "defeat the negative-implication canon").

The structure of Title 7, of Chapter 11, and of section 7–11–30, further support this reading. The South Carolina Election Law as a whole presents a coherent approach to ensuring that elections are fair and orderly. Chapter 11 provides a comprehensive scheme governing "Methods of Nomination." S.C. Code Ann. Title 7, Ch. 11 ("Designation and Nomination of Candidates"). The provisions within Title 7 generally refer to all primaries—including presidential preference primaries—and sensibly govern all primaries according to a consistent set of rules.

For example, section 7–9–10 requires that a certified political party "nominate candidates of that party on a regular basis, as provided in this title, in order to remain certified." It then goes on to list a party's specific obligations, including nominating and certifying candidates for a general election:

> Any certified political party that fails to . . . nominate candidates for national, state, multi-county district, countywide, or less than countywide office by convention or party primary as provided by Sections 7-11-20, 7-11-30, and 7-13-40; and that fails to certify the candidates as provided by Section 7-13-350 in at least one of two consecutive general elections . . . must be decertified by the State Election Commission.

S.C. Code Ann. § 7–9–10. Importantly, this section undoubtedly applies to a party's obligation to nominate and certify candidates for President (as well as other offices), because several of the referenced sections explicitly mention that. *See* S.C. Code Ann. § 7–11–20 (discussing presidential preference primaries); *id.* § 7–13–350 (discussing certifying candidates for President). In other words, other provisions of Title 7 equally apply to a party's process for nominating candidates for President and for other offices. In this context, then, section 7–11–30's application to all offices—including President—makes even more sense. *See Browning,* 307 S.C. at 125, 414 S.E.2d at 117 ("A statute as a whole must receive a practical, reasonable, and fair interpretation[.]"); *see also* Scalia & Gardner, *supra*, at 167 ("Context is the primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts.").

Thus, all of the interpretative tools lead to the inescapable conclusion that section 7–11–30 applies equally to presidential preference primaries as it does to other primaries, and defendants violated section 7–11–30 by canceling the primary without obtaining the support of both the state convention and a majority of the state primary electorate.

* * *

South Carolina statutory, constitutional, and administrative and corporate law all required the State Executive Committee to comply with party rules before canceling the 2020 Republican presidential primary. But the State Executive Committee did not do so. Instead, it violated Rule 11(b)(1) by canceling the presidential primary without a vote of the state party convention. And for the very same reason (as well as the failure to obtain the support of the South Carolina Republican primary voters), the State Executive Committee also failed to follow section 7–11–30's mandatory procedure when switching from a party primary to a party convention. Plaintiffs are therefore likely to establish that the State Executive Committee violated South Carolina law when it canceled the 2020 presidential primary.

## II. A preliminary injunction is necessary to protect the status quo.

For an injunction to issue, it must be "necessary to preserve the status quo ante[.]" *Poynter Invs.,* 387 S.C. at 586, 694 S.E.2d at 17. Here, defendants' actions are an attempt to change the status quo unlawfully. Rule 11(b)(1) commits the party to holding a presidential preference primary unless the state convention votes to cancel the primary. Accordingly, the status quo prior to defendants' unlawful

actions was for the state party to hold a presidential preference primary. And per section 7–11–20(B), the State Election Commission is required to administer the primary, following the South Carolina Republican Party's notification of the date of the primary. *See* S.C. Code Ann. § 7–11–20(B)(3) ("The political party shall give written notice to the State Election Commission of the date set for the party's presidential preference primary no later than ninety days before the date of the primary."). As a result, to preserve the status quo, this Court should issue an injunction requiring defendants to hold a presidential preference primary—as required by the law and the rules—and to notify the State Election Commission of the date.

## III. Plaintiffs will suffer irreparable harm absent a preliminary injunction.

Plaintiffs will be irreparably harmed absent a preliminary injunction. Plaintiffs desire to vote in the 2020 Republican presidential primary, Ex. 1, Aff. of Mr. Inglis ¶ 4; Ex. 2, Aff. of Mr. Heindel ¶ 4, and no after-the-fact relief can compensate for their lost opportunity to vote.

Harm becomes irreparable when "it is not fully compensable by monetary damages." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007). "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Moreover, even the extreme remedy of contesting an election result in light of irregularities is not available here because the issue is whether the vote is held in the first place. *Cf. Denman v. City of*

*Columbia*, 387 S.C. 131, 141, 691 S.E.2d 465, 470 (2010) (finding that plaintiff would not suffer irreparable harm because, among many other reasons, he could contest the election afterward). Accordingly, plaintiffs' harm is irreparable because there will be no way for this Court to fully remedy their disenfranchisement at the end of this case, even if they prevail on the merits. And that's all the truer here given South Carolina's "First in the South" primary status. *See* Ex. 1, Aff. of Mr. Inglis ¶ 5; Ex. 2, Aff. of Mr. Heindel ¶ 6.

The South Carolina Republican Party should not be permitted to argue otherwise. It, after all, has previously argued that canceling a presidential primary would cause irreparable harm. *See* Def. S.C. Republican Party's Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj./Rule 12(b)(6) Mot. to Dismiss at 6, *Coyne v. S.C. Sec'y of State*, No. 3:15-cv-03669 (D.S.C. Nov. 16, 2015), ECF No. 18. And the party's position in *that* lawsuit (but not *this* lawsuit) is consistent with a 2014 party resolution recognizing that selecting "nominees in a backroom or underhanded fashion" could "could *irrevocably damage* the integrity of our primary process and inadvertently affect our 'First in the South' presidential preference status." S.C. Republican Party State Exec. Comm. Res., *Support of Integrity, Openness, and Fairness in the Primary Process* (May 3, 2014) (emphasis added).[16] So any attempt by the party to argue that the harm here is repairable should be unpersuasive.

[16] *See also* The S.C. GOP Website, https://www.sc.gop/about/scgop/ (last visited Oct. 8, 2019) (claiming that "South Carolina's 'First in the South' Presidential Primary has been an important test for Presidential candidates" and that it has "unique characteristics and demographics that are reflective of the national electorate, and therefore a much stronger indicator than the other early primaries and caucuses").

## IV. Plaintiffs have no adequate remedy at law.

Plaintiffs have no adequate remedy at law. "An 'adequate' remedy at law is one which is certain, practical, complete and efficient to attain the ends of justice." *ZAN LLC v. Ripley Cove, LLC*, 406 S.C. 404, 413-14, 751 S.E.2d 664, 669 (Ct. App. 2013) (quoting *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 289 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)). Here, there is no "certain, practical, complete and efficient" remedy to plaintiffs' injuries other than injunctive relief. *Id*. Plaintiffs' injuries cannot be compensated with monetary damages or with any other relief that could be granted in lieu of the opportunity to vote in a presidential primary. *See Milliken & Co. v. Morin*, 386 S.C. 1, 8–9, 685 S.E.2d 828, 832–33 (Ct. App. 2009) (concluding that an adequate remedy at law is one where monetary damages are quantifiable) *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012). Plaintiffs therefore have no adequate remedy at law, and this Court's exercise of its equitable powers to grant injunctive relief is justified.

## V. This Court should not require a bond.

This Court should not require a bond in this case for two reasons.

*First*, this Court should exercise its discretion to not require security from plaintiffs seeking to protect the public interest and enforce constitutional rights. The source of that discretion can be found in the Note to South Carolina Rule of Civil Procedure 65(c), which specifies that the rule is "substantially" the Federal Rule of Civil Procedure 65(c). Federal Rule 65(c) has long been construed to preserve a narrow exception to the bond requirement for cases involving public interest litigation. *See Temple Univ. v. White*, 941 F.2d 201, 219–20 (3d Cir.

1991).[17] In particular, courts have long recognized an exception to Rule 65(c)'s security requirement for non-commercial public-interest litigation that seeks to vindicate important rights. *E.g.*, *Temple Univ.*, 941 F.2d at 219–20; *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981); *Doctor John's, Inc. v. City of Sioux City, Iowa*, 305 F. Supp. 2d 1022, 1043–44 (N.D. Iowa 2004). Plaintiffs' case falls well within that exception, as it seeks to vindicate plaintiffs' right to vote—a right whose vindication should not be contingent upon plaintiffs' ability to pay an injunction bond. *Cf. Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.").[18]

*Second*, even assuming that Rule 65(c) has no such exception, no security is required as defendants will incur no costs or suffer any damages if the preliminary injunction "is found to have been wrongfully enjoined or restrained." S.C. R. Civ. P. 65(c). Defendants do not pay for the cost of their presidential primary elections.

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[17] *See, e.g.*, *Pharm. Soc. of State of New York, Inc. v. New York State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995); *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981).

[18] *Atwood Agency v. Black*'s rejection of a nominal bond in a trade secret case, *see* 374 S.C. 68, 73, 646 S.E.2d 882, 844 (2007), is not to the contrary. Because it involved a run-of-the-mill trade secret claim, *Atwood Agency* neither purported to address nor resolve whether such a bond could be set in a case in involving public-interest litigation aimed at protecting important civil rights. *Id.* Moreover, the South Carolina Supreme Court merely held that it is error for a court to issue an injunction on a nominal bond on the assumption that a preliminary injunction will be upheld. *Id.*

Instead, the State Election Commission now covers the cost of major certified parties' primary elections. *See* S.C. Code Ann. § 7–11–20(B)(2); Act No. 256, 2014 S.C. Acts; *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. at 369–78, 718 S.E.2d at 433–39. Defendants will incur no costs or damages should they have been found to be wrongfully enjoined and no security is necessary.[19]

**CONCLUSION**

The Court should grant a preliminary injunction ordering the Executive Committee of the South Carolina Republican Party to: (1) inform the State Election Commission that it will hold a presidential preference primary election in February 2020; and (2) withdraw any delegate allocation plan it may have submitted to the Republican National Convention, and to resubmit a delegate allocation plan following the final resolution of this action that is consistent with this Court' orders.

[Signature Page Follows]

[19] If Defendants are concerned with saving taxpayers money, they could hold the Republican presidential primary on the same date as the Democratic primary—February 29, 2020. As the *Post and Courier* editorial page recently suggested, "the added cost to hold the primary on the same day as the Democratic primary would be minuscule—possibly low enough to be covered by candidate filing fees." The Editorial Staff, *Editorial: No Trump SC Primary? Blame SC Legislature for Letting Parties Call Shots*, The Post and Courier (Sept. 12, 2019), *available at* https://www.postandcourier.com/opinion/editorials/editorial-no-trump-sc-primary-blame-sc-legislature-for-letting/article_7a835fc0-d4d6-11e9-ae2a-274aade1d753.html.

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Respectfully submitted,

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[20] *Pro hac vice* applications submitted on October 8, 2019.